# STATE OF NEW HAMPSHIRE DEPARTMENT OF LABOR CONCORD, NEW HAMPSHIRE



## **AMERITEXT CORPORATION**

#### **DECISION OF THE HEARING OFFICER**

**Appearances**: James H. Schulte ESQ., Attorney for the Employer

Nature of Dispute: RSA 275:43 I unpaid wages

RSA 275:43-b unpaid salary

RSA 275:44 IV liquidated damages

**Employer:** Ameritext Corporation, 45 Harvey Mill Road, Lee, NH 03861

**Date of Hearing:** December 17, 2013

February 25, 2014

Closing Statements March 20, 2014

**Case No.** 46421

#### BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on July 31, 2013. The notice was sent to the employer and there was an objection. The objection was sent to the claimant and there was a request for a hearing. The Notice of Hearing was sent to both parties on November 6, 2013. The Wage Claim was amended to request a finding for liquidated damages.

The claimant testified that he started to work for the employer on June 1, 2012. His first contract was for him to work in New Hampshire but that was taken out the employment agreement. The first contract stated that the salary would begin when the company has actual sales of its services and products. The company finally set a "launch" date for February 1, 2013. The claimant said that his contract was for \$80,000.00 per year until February 1, 2018. The claimant believes that he is due \$400,000.00 for the life of the contract. The claimant also invested \$100,000.00 in the company and was told that if the company sold, he would get \$1,000,000.00 as a return on his investment. He said the employer told him that he would get wages for the investment but was given common stock.

The employer testified that the claimant was an Independent Contractor and was also a Distributor for the product under development. Because the employer put so much money into the product, he said that the claimant came forward with a \$100,000.00 investment. The employer offered stock for this investment and also for the claimant's work.

The employer also testified that the claimant, as a Distributer, was giving the employer false expectations of future sales. These were the numbers that the employer based the future of the company. The employer also stated that the claimant was under a contract that the salary would commence with the company having actual sales of it's services and products. There was also a clause that the company had to have sufficient means to pay the salary.

The company never was in a position that they made profits and so no wages were paid. The issuing of stock gave the claimant a 5% ownership share of the company. The CEO testified that he tried to sell the company for an amount that would have paid everyone what was due. The sale never materialized. The employer stated that even the Patent Attorney was paid in stock for work performed. The claimant was never an employee because the company never made any money to pay wages. The claimant was a Distributor and along with other Distributors gave reports of high expectations of sales. None of the sales were ever realized.

#### **FINDINGS OF FACT**

RSA 275:43 I. Every employer shall pay all wages due to employees within 8 days including Sunday after expiration of the week in which the work is performed, except when permitted to pay wages less frequently as authorized by the commissioner pursuant to paragraph II, on regular paydays designated in advance by the employer and at no cost to the employee.

803.01 (a). Pursuant to RSA 275:43, I and II, every employer shall pay all wages due to his/her employees within 8 days, including Sundays, after the expiration of the workweek on regular paydays designated in advance. Biweekly payments of wages shall meet the foregoing requirement if the last day of the second week falls on the day immediately preceding the day of payment. Payment in advance and in full of the work period, even though less frequently than biweekly, also meets the foregoing requirement.

This is the section of the law that mandates an employer to pay an employee all wages due at the time the wages are due and owing.

RSA 275:43-b: Payment of Salaried Employees. –I. A salaried employee shall receive full salary for any pay period in which such employee performs any work without regard to the number of days or hours worked; provided, however, a salaried employee may not be paid a full salary in each of the following instances:

- (a) Any pay period in which such employee performs no work.
- (b) When an employee receives a disciplinary suspension without pay in accordance with the Fair Labor Standards Act, as amended, for any portion of a pay period, and written notification is given to the employee, at least one pay period in advance, in accordance with a written progressive disciplinary policy, plan or practice and the suspension is in full day increments.

- (c) If an unpaid leave of absence for a salaried employee is allowed pursuant to a written bona fide plan, policy or practice for absences, of a full day or more, of an employee caused by bereavement leave.
- (d) Any portion of a work day or pay period for leave taken under, and in accordance with, the federal Family and Medical Leave Act of 1993, as amended, if written notification from the employer stating the reason for such leave is given to the employee and placed in the employee's personnel file.
- (e) If the salaried employee voluntarily, without coercion or pressure, requests time off without pay for any portion of a pay period, after the employee has exhausted any leave time pursuant to a written bona fide leave plan, practice or policy and such leave time requested by the employee is granted by the employer.
- II. Employers may prorate salary to a daily basis when a salaried employee is hired after the beginning of a pay period, terminates of his own accord before the end of a pay period, or is terminated for cause by the employer.
- III. The employer may offset any amounts received by a salaried employee for jury duty or witness fees or military pay for a particular pay period, against the salary due for that pay period pursuant to a written bona fide leave plan, practice or policy.

This part of the law guides the rules for a salaried position.

RSA 275:44 IV reads: "If an employer willfully and without good cause fails to pay an employee wages as required under paragraphs I, II or III of this section, such employer shall be additionally liable to the employee for liquidated damages in the amount of 10% of the unpaid wages for each day except Sunday and legal holidays upon which such failure continues after the day upon which payment is required or in an amount equal to the unpaid wages, whichever is smaller; except that, for the purpose of such liquidated damages such failure shall not be deemed to continue after the date of filing of a petition in bankruptcy with respect to the employer if he is adjudicated bankrupt upon such petition."

A claimant can request a finding for liquidated damages up to the amount of the Wage Claim. The Hearing Officer must find that the employer was willful and/or did not have good cause for their action(s).

It is the finding of the Hearing Officer, based on the submissions and the testimony presented for the hearing, that the Wage Claim is invalid. The claimant has the burden to show that there are wages due and owing and he did not meet this burden. The claimant was an officer of the company and a shareholder. The claimant did say that there was the potential for many sales and much profit. To this end, the claimant invested money and became a Distributer for the company and its' product and services.

The was several employment contracts presented that say the wages will be paid when the company makes money or has sufficient income to pay wages. It is clear to the Hearing Officer that all went along with this in hopes of a large pay day when the product was sold and established. This did not happen.

The employer was credible in his testimony that there were hopes of a huge payout once the product was into the market and reaping sales. Key people were kept on with the company as officers and not employees by being issued stack and thereby a share of the company. The employer also stated that all involved were aware of the projections from Distributors and the amount of money that could be made once the product was in the market and selling.

The Wage Claim is invalid and there is no finding for liquidated damages. The company did not make any profits to pay wages.

### **DECISION AND ORDER**

As RSA 275:44 IV holds an employer liable to an employee for liquidated damages if the employer willfully and without good cause fails to pay wages due in the time frame required by statute, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that the employer willfully and without good cause failed to pay wages due in the time frame required, it is hereby ruled that the portion of the Wage Claim for liquidated damages is invalid.

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as this Department finds the claimant failed to prove by a preponderance of the evidence that he was not paid all wages due, it is hereby ruled that the Wage Claim is invalid.

/s/
Thomas F. Hardiman
Hearing Officer

Date of Decision: April 7, 2014

Original: Claimant cc: Employer

TFH/cag